[redacted]

RICHARD MASON, PLAINTIFF,

v.

ANSON RUDDOCK, SILAS A. ALCOTT AND URI BALCOM.

ON CERTIFICATE OF DIVISION OF OPINION, &c.

[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES.

No. 191.

RICHARD MASON, PLAINTIFF,

vs.

ANSON ELDRED, ELISHA ELDRED AND URI BALCOM,

ON CERTIFICATE OF DIVISION OF OPINION, &c.

BRIEF AND POINTS OF PLAINTIFF.

GEORGE W. LAKIN, Att'y for Plt'ff., Milwaukee Wis.

I

The exemplification of the record offered at the trial by the defendant, was inadmissible under the pleadings, to-wit: under the plea of non-assumpsit.

The object of pleading is the production of an issue, that is to say, to determine the precise point in controversy, in order that the parties may be prepared to try, and may try that point, and no other. Courts are disposed to be liberal and to admit of a departure from the strict logic and rules of pleading, for the furtherance of justice; and therefore, when anything at variance with the issue technically formed, was proposed to be es-

tablished at the trial, by a relaxation of the rules, it was, and has been usual for the party proposing to establish a defence so at variance, to give notice of the special matter, under the general issue. In that way, the end and aim of pleading were answered, and the party for whose benefit such notice was given, was not, and could not be taken by surprise. The plea of *non-assumpsit*, puts the plaintiff to the proof of all that he alleges. It makes no allusion to a "*former recovery*," or to any claim that the supposed original liability has assumed a higher form, nor does it afford the plaintiff any opportunity to prepare to contest such a point. There are some authorities sanctioning a contrary doctrine, but their reasoning does "not appear to accord with the logical precision which usually prevails in "pleading. It is also at variance with the rule, that a matter of defence, "which *admits* the facts stated in the declaration, but avoids them, should "be specially pleaded," (see Chitty's Pl., vol. 1, 479 page), also Chitty's Pl. vol. 3, 929 page, and notes at bottom.

2 B. and Ald. 668.

Dexter vs. Hazen and Arnold, 10th Johnson Reports, 246.

This was an action of assumpsit, before a Justice of the Peace, where some reasons might be urged for relaxing the rules of pleading.

The defendant pleaded *non-assumpsit*. The defendant, at the trial, offered in evidence a trial and judgment between the same parties before another justice, in an action brought by Dexter against Hazen and Arnold. This evidence was objected to by the plaintiffs counsel, on the ground *that it ought to have been pleaded*, or notice given of it, at the time issue was joined, and that it was now too late.

"*Per Curiam.*" The evidence of the former trial and judgment was "properly rejected, as it had not been pleaded, nor notice given of it, "at the time of joining issue."

Besides, it will be observed that in the cases referred to by the defendants counsel, to sustain the doctrine that a judment recovered against one joint co-obligor, or co-promisor, is a bar to a recovery against the other, such recovery has usually been pleaded specially.

But suppose a "*former recovery*," can be given in evidence, under the plea of *non-assumpsit*, without notice of the special matter. A "*former recovery*." is a recovery of a judgment, for the identical cause of action, against the identical party, against whom judgment is sought. In this case who is that party? Anson Eldred, who alone has been served with process. There was no recovery against Anson Eldred, in the Court in Michigan; it is not pretended that there was any.

At a former term of the United States Circuit Court, for Wisconsin, the plaintiff sued on his exemplification of record, on the hypothesis that it showed a judgment against all of the defendants. And the Court ruled that it showed a judgment against Elisha Eldred alone. The plaintiffs attorney then moved to amend his declaration, by adding a count in debt on the note. The motion was denied. The plaintiff then, as a *dernier resort*, entered a non-suit, and commenced *de novo* on the note. If the Court holds that he has no remedy here, it would seem to be a denial of justice.

A special plea, framed on the basis of the exemplification of the record from Michigan, could not be denominated a plea of a "former recovery," unless Anson Eldred is allowed to call a judgment against Elisha Eldred, a "*former recovery.*"

The Statutes of Michigan (and the same in substance exists in many of the States) authorizing judgments to be taken in form, against parties not served with process is an *anomaly* in the law, and must necessarily give rise to anomalous pleadings. A party desiring to avail himself of such exemplification of record, on the trial, should plead it, and should offer "*to verify it* by the record." The plaintiff could then demur making an issue of law, to be tried by the Court, or if he chose to deny the existence of the record, he could plead *nul tiel record*, or present an issue as to the identity of the causes of action. We submit therefore, that the authorities which sustain the doctrine of allowing a former recovery to be shown under the plea of *non-assumpsit*, are not applicable to the case at bar, for the reason that there is no pretence of a former recovery against Anson Eldred, against whom we seek to obtain judgment, as is apparent from the facts disclosed in the certificate of division of opinion. If the defendant intended to rely, for a defence, on the anomalous facts shown in the exemplification, then he should have apprised the adverse party of the substance of that defence.

It is therefore insisted that the Judges in the Court below, should have agreed to exclude said exemplification, for the reason, if for no other, that it was not admissible under the pleadings, to-wit: under the naked plea of *non-assumpsit.*

Again. The suit in Michigan might have been brought against Elisha Eldred, *severally*. In such event, if he had interposed a plea in abatement, that the cause of action was a *joint* and not a several obligation, the plea would probably have been sustained, and the action would have abated. If he had pleaded *non-assumpsit*, or any plea to the merits, the defence founded on the *joint* nature or character of the note, would not have been available. Such defence could only be made available by *plea* in *abatement.*

(See Pothier on obligations, 2d vol. 52, 53, and 54 pages.)

"A joint obligation is essentially different from an obligation *in solido*, "as the creditor has not a right to proceed against each or any of the par- "ties individnally, but can only prosecute his claim against them jointly.

"But if a creditor sues one of several joint debtors, the objection that "the other ought to be joined, *can only be taken by plea in abatement*, "and this, notwithstanding it appears by the plaintiff's own showing that "more than one are liable."

"If two are sued upon the joint obligation of three, it seems also, that "the exception can only be taken *in the same manner*, &c., subject to the "right of exception, by plea in abatement, I conceive it to be clear that "separate actions may be maintained against each of several joint debtors, "in like manner as if they were debtors *in solido*.

* * * *

(Pothier on obligations, 2d vol., 55th page.)

"In the English as in the civil law, the pursuit of one or more of several "debtors, who are each respectively liable for the whole does not affect "or prejudice the right against the others, which continues entire until the "creditor has obtained an actual satisfaction for his demand."

In the case of Minor, vs. the Mechanics' Bank of Alexandria, 1st Pet., 74th page. the Court says "he (the plaintiff) must sue all, or one (of sev- "eral joint obligors.) The objection however, is not fatal to the *merits*, "but is pleadable in *abatement only*, and if not so pleaded, it is waived by "pleading to the merits. The reason is that this obligation is still the deed "of all the obligors who are sued, though not solely their deed; and there- "fore there is no variance in point of law between the deed declared on and "that proved.

Barry vs. Boyle, 1 Peters, 317, was a suit brought on a partnership transaction against one of the partners. The Court (Marshal Chief Justice) "say: The principle is, that a contract made by co-partners is *several* as "well as joint, and the assumpsit is made by all and by *each*. It is obligatory "on all and each of the partners."

Gow, on partnership, 212 page, states that "By the mercantile law, a "partnership contract is *several*, as well as joint, and Courts of Equity "adopting to its full extent, that law for their guidance, have considered "joint contracts of this description as standing upon a different footing from "ordinary joint contracts, and have ascribed a *several* as well as a joint op- "eration to them."

It is plain from the above authorities, that if the note had been treated as *several*, in the suit in Michigan, and Elisha Eldred had been sued alone, and had in that suit pleaded *non-assumpsit*, judgment could have been obtained against him there. The non-joinder of Anson Eldred, not going to the merits, would have been *waived* by the plea of *non-assumpsit*.

We have sued Anson Eldred here in Wisconsin, treating the note substantially as several, Anson Eldred pleads *non-assumpsit*.

The principle deducible from the above authorities, even admitting that a partnership note is *joint*—and not *joint and several*, is, that Anson Eldred, by pleading *non-asumpsit*, waives the technical defence, founded on the *joint* character of the note, and puts himself on the country, on the *merits of the liability*.

The plaintiff has the note of both defendants. Upon principle, he is entitled to judgment against both. The defendant's counsel say no. That the plaintiff obtained judgment in Michigan against Elisha Eldred, who escaped, or could not be found there, and did not appear; *and that therefore, he is discharged from all liability.*

If the defendants had been physically and inseparably joined together, like the Siamese twins, so that service of process could have been obtained on them all we could have avoided the dilemma!

Or, having failed to collect the judgment in Michigan against Elisha Eldred, if we had vacated that judgment, before bringing suit in Wisconsin against Anson Eldred, it is possible that the "*former recovery*" would not have been available as a bar, under the plea of *non-assumpsit*.

It is worthy of note, that in all of the cases in which defences like the one in the case at bar, have been resorted to. or attempted to be made available, it has been done by pleading the matter specially.

II

There is a distinction between co-partnership promissory notes, or contracts, and ordinary joint notes, or contracts.

Co-partnership notes, though in form, joint, are in substance and effect several, as well as joint.

This is shown by the authorities above quoted, and if this proposition is sound, it rules out the defence, in any event.

III

A judgment against one joint debtor, is not a bar to a suit against the other, even though pleaded at the proper time, and in due form.

The defence offered, was not good in substance. This must be decided

upon principle, reason, and authority. That faith or that philosophy is best for which a good, or logical reason can be assigned; a reason which convinces the mind, and makes one feel that the conclusion is just.

So with a legal decision, or reported case presented as authority. That case is the most weighty, and as such should influence the judgment the most which assigns good reasons for the positions assumed, or conclusions arrived at. There are conflicting decisions on most legal points, and on this there is an apparent conflict.

In the case of Sheehy vs. Mandville and Jameson, 6, Cranch, 253, the plea interposed by Mandville, was, in substance, that, in a former suit, judgment had been rendered in favor of Sheeby, against Robert B. Jameson, (the partner of Mandville), on the same note.

By the opinion of the Supreme Court of the United States, delivered by Marshal, Chief Justice, it appears that the plea did not constitute a bar to the action. In that case the action was brought on a note, signed, "Robert B. Jameson." In the first action the note was treated as the note of *Jameson*, alone, and judgment rendered against him. In the second action it was treated as the note of Mandville and Jameson, trading under the name of "Robert B. Jameson." There was a judgment against Jameson, one of the partners, and the Supreme Court of the United States decide, (the precise point presented in the case at bar) it to be legal and proper to render judgment against the other partner.

There have been many attempts in State Courts, to overturn this decision, and sometimes, in the Federal Courts, to evade it, by getting up and drawing fancied distinctions, but it stands a monument of wisdom and strength, because it is founded in good reason. Its foundation is stated by the Chief Justice, as follows:

"*In point of real justice, there can be no reason why an unsatisfied "judgment against Jameson, should bar a claim upon Mandville.*"

In all the efforts to upset this decision, no just or valid reason has ever been assigned against it.

In the case of Dennett vs. Chick, 2 Greenlief, (Me.) Reports, 191, the precise point was decided to wit: that "a judgment in another State "against one of two joint promisors, without satisfaction is no bar to an "action in this State, (Maine) against the other, upon the original con-"tract."

In the case of Wann, et. al. vs. McNully, 2 Gillman, (Ill.) 355, which is adverse to our position, the Court say that, "in the case of Sheehy vs. "Mandville and Jameson 6 Cranch, 253. The precise question which we

"are now considering, came before the Supreme Court of the United States," &c.

* * *

"And that, afterwards, the same question came before the Supreme "Court of New York, in the case of Robertson vs. Smith, 18 Johns, "459, where the subject is carefully examined by Chief Justice Spencer, "and the case of Sheehy vs. Mandville, held *not to be good law*! "He "holds, that as in actions of assumpsit, it is necessary to prove a joint "liability against all of the defendants where the demand has been reduced "to a judgment against a part of the defendants, as to whom it is merged "in the judgment, and gone, the action cannot be maintained against any "because it cannot be against all, *there remaining no subsisting joint* "liability! "But it is not in New York alone, that the case in 6 Cranch, "has been overruled. It has shared the same fate in all of the State "Courts, wherever the question has arisen, so far as I have been able to "discover." The judge who delivered the opinion, in Wann vs. McNully, 2 Gillman, 355, cites several cases in the State Courts, and says that, "in "all of these cases, the questions were precisely identical with the one before "us, and in most, if not all, the case in 6 Cranch was expressly referred "to and *overruled*." He then goes on tostate the respect which he feels for the opinions of the Supreme Court of the United States: but that he is well satisfied that the rule adopted by the several State Courts, is more consistent with the principles of law, and *supported by better reason*!

What are the better reasons? They are these, to-wit: As to the defendant against whom the judgment is rendered the original liability is *merged*, that is to say, the liability as to him, has been adjudicated upon, and found to be valid, and has assumed a higher character; therefore the action cannot be sustained against any of the co-promisors. (here now is the potent reason,) "*there remaining no subsisting joint liability*!"

What has become of the joint liability? Did the Court annihilate it, when it adjudicated, and pronounced the claim valid, as against the one served with process? Why was the Court silent as to the validity of the claim against the co-promisor? Simply because he the co-promisor, had not been notified, or served with process. But, when afterwards notified, in due form, whether by *seire facias*, or other legal process, it is meet and proper that the Court shall pass upon the validity of the claim as to the other co-promisor, and in doing so, how can it be, that any attribute, or quality, or *jointness* of the liability, is destroyed.

In the same case the court urges the further reason that "there

"is such a manifest impropriety in allowing a party to have two judgments "in full force against the same defendants for the same cause of action that "we cannot reconcile it to our notions of a correct administration of justice." It is not an unusual or an unheard of thing for a party to have more than one judgment for the same cause of action, although he is entitled to but one *satisfaction.*

The case of Thompson vs. Emmert, 15 Ills. 415, affirms the doctrine in 2 Gillman. It begs the question, by saying that the judgment against one joint contractor operates as an extingnishment of the cause of action and a discharge of the other partner or joint contractor, from all liability to the creditor."

It is conceded that there are many decisions in the State courts of the same import, and the most of them have the frankness to face the decision in 6 Cranch, instead of beating around it. But I have looked in vain and searched in those decisions for one good and valid reason, such as ought to form the basis of a decision.

IV

The statutes of Michigan and of Wisconsin correctly construed, negative the conclusion, that the judgment against Elisha Eldred, is a bar to an action against Anson Eldred.

The defendant probably intends to be understood to say that the plaintiff made a mistake in suing. That he should have waited until he could have found all of the defendants in Michigan; that the liability being in its essence or character joint, that essence or character, like the human soul is one and indivisible, and is totally exhausted or appropriated in the rendition of the judgment against the one served; or in other words, that the sum total of that esseuce or character adheres to that part of the joint and indivisible liabilty which assumes the higher nature of a judgment against the joint contractor served with process.

The error of the defendants, their counsel and of their authorities, is found in their premises, and arises from taking a too refined and metaphysical view of a mere matter of dollars and cents, or promise to pay money, which divested of sophistry, is a plain, simple and practical matter.

But suppose the cases referred to by the defendant's counsel, and the reasoning and arguments that, the rendition of judgment against one joint contractor, at *common law*, extracts, extinguishes or destroys the joint liability, and vitality of the contract, as against the other contractor, and that the other co-obligor is thereby forever discharged from liability, conclusions

which are contrary to reason and justice, we invoke the aid of the written law—the statutes of Michigan and of Wisconsin.

To avoid the erroneous conclusions to which misdirected metaphysical minds had ~~aimed~~ *agreed* on this subject of joint contracts, the Legislature of Michigan provided as follows:

(See compiled laws of Michigan of 1857, 2 vol., chap. 133. page 1219.)

SECTION 1. In actions against two or more persons jointly indebted upon any joint obligation, contract or liability, if the process issued against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process.

SECTION 2. Such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant, it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence.

SECTION 3 provides that execution shall be issued *in form* against all of the defendants.

SECTION 4. Provides, in substance, that the execution shall be levied on the sole property of the defendant served, or on the joint property of all the defendants.

SECTION 6. Provides that the plaintiff may sue out a *scire facias* against the defendants not served to show why the plaintiffs ought not to have execution against them, the same as if they had been served with the process by which the suit was commenced.

SECTION 7. Provides that after twenty days the court may order that execution issue in the manner and with like effect as if the defendants had been served with the original process.

The Revised Statutes of 1858 of Wisconsin, Chap. 124, Section 11, provides that when the action is against two or more defendants, and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows:

If the action be against several persons jointly indebted upon a contract, he may proceed against the defendant served, unless the Court shall otherwise direct, and if he recovers judgment, it may be entered in form against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, &c.

Chap. 140, Section 1. When a judment shall be recovered against one or more of several persons, jointly indebted upon a contract, by proceeding as provided in section eleven of chapter 124, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned.

What is this action?

Substantially what the statutes contemplate. a summons for the defendants on whom no service was had, to show cause why they should not be bound in the same manner as if they had been originally served. Though being in the U. S. Court, we are obliged to proceed according to the forms of practice in such Court. What cause does Anson Eldred attempt to show? Why that the note has been adjudged valid in the Michigan Court, against Elisha Eldred, though never paid. Is that sufficient cause why Anson Eldred should not be held?

The obvious intent of the Legislature was to preserve the joint character of the joint liability, and not to impair the obligation of the *joint contract*, but to follow, the co-obliges, and their effects, until satisfaction should be had. And so it is in substance provided. that by reason of the joint character of the liability (still retained and preserved, notwithstanding judgment is entered against one of the joint contractors) execution may be levied on the individual effects of the one served with process, and against the *joint effects* of all the joint contractors.

In all candor, and with the most profound respect for the opinions of learned judges of the State Courts, probably formed without the light of this legislation in view, I ask, if it be tenable, logical, or sound to conclude (as Treat C. J. does in the case of Thompson vs. Emmert, 15, Ill. 4 5,) That "the judgment operates as an extinguishment of the cause of action, "and a discharage of the other partner or joint contractor, from all lia- "bility to the creditor"?

Or as Chief Justice Spencer does, in substance, in Robertson vs. Smith, 18 Johns, 460, conceding the case of Sheehy. vs. Mandville, (6 Crauch, 253) "entitled to high respect from the elevated character of the judges "who compose that Court; though "not authoritive or binding here" (there;) that "*there remains no subsisting joint liability*"?

On the contrary, does not the Statute, by a fair, legal and sound construction or even without any construction at all substantially provide that the other joint contractor shall not be discharged, and that the joint liability shall continue, and subsist?

Judge Story, in the case of Trafton Bright vs. The United States, 3 Story's Reports, 646, endorsing the doctrine in the case of King vs. Hoar, [an English case], 8 Jurist 1127, with all of his legal lore and classic erudition, which are unsurpassed, is "*almost persuaded*," but not quite, to adopt the metaphysical thread of the argument.

He says: "If the demand be founded on a joint contract, it is certainly *merged*, and barred in the judgment as to the first contractor served," (and by being *merged*, he of course means, not that the claim is destroyed, but that a higher security, to wit: the judgment, is substituted; that is to say, the simple contract or liability as to that defendant, is raised by adjudication, to the higher grade of contract, to wit: to that of a judgment.) Judge Story continues, "and if so merged and barred, it would seem equally barred as to the other, since no joint suit can be maintained thereon, and it *would seem* to follow that the contract being an entirety and merged or extinguished by the judgment as to one, might be gone as to the other, *by operation of law*." Mr. Justice Story acknowledges the binding force of Sheehy vs. Mandville, but distinguishes the case then before him from that case in this, to wit, that in Sheehy vs. Mandville et. al. the bar was pleaded by one of the debtors, whereas, in the case before him, it was set up by both.

So, in this case, we say, that the plea is interposed by only one of the joint contractors, to wit: by the one against whom no judgment has been rendered, and as to whom there can be no *merger* of the claim.

Judge Story finally decides that case on other grounds, to wit: on the ground that Bright, the co-defendant was never liable to the United States, in the matter before the court. But that he was an employee of Trafton, and liable to him alone. It is well worthy of note that Judge Story, in that part of the opinion which looks to the discharge of the joint contractor, against whom no judgment was rendered, speaks with great modesty, and commendable timidity, saying not that it does, but that it would *seem* to follow, (being somewhat embarrased at the *quasi* conclusion), that the contract being an entirety, and merged in the judgment as to one, might be gone as to the other, "*by operation of law.*"

Now, that "*operation of law*" is what the statutes of Michigan and Wisconsin check, obviate, forbid. They are the *lex scripta*, which comes to the plaintiff's relief, if all arguments fail.

In the case of Oakley vs. Aspinwall, 4th Comstock, 513, a decision made by the highest judicial tribunal in New York, Chief Justice Bronson can-

vasses the effect of a judgment against one co-obligor under a similar statute, with logical precision and legal ability.

Oakley sued Young & Baker on a joint bond, as co-partners. Young appeared and gave a cognovit. Baker was never served with process, and never appeared. He resided in Cuba. Judgment was rendered against both in October 1834, according to the provisions of the act concerning joint debtors, which were similar to the Michigan and Wisconsin acts. In 1837, the plaintiff on making oath that he had a demand of $22,492,89, over and above all discounts, "*arising* on a certain judgment against the said John W. Baker and John Young, obtained an attachment. To the last named action, Baker appeared and got the attachment discharged, on giving bond conditioned to pay the amount justly due by Baker & Young, to the plaintiff " on account of any debt so claimed and sworn to by him.

Oakley vs. Aspenwall is the action on that bond, and the Court is of necessity obliged to decide upon the effect of the original judgment, to give a legal construction to the statute which authorizes the entry of a judgment in form against both obligors, when only one has been served with process, and to indicate the remedy that the obligee has against the obligors, after the entry of such judgment. That case decides that the remedy is on the original demand and not on the judgment.

Chief Justice Bronson, delivering the opinion of the Court says. "It is " said that the original demand was *merged* in, and extinguished by the " judgment, and consequently that the plaintiff must sue upon the judgment " if he sues at all. That would undoubtedly be so if both the defendants " had been before the Court in the original action."

" But the joint debtor act creates an anomaly in the law. And for the " the purpose of giving effect to the statute, and at the same time preserv- " ing the rights of the parties, the plaintiff must be allowed to sue on the " original demand."

" There is no difficulty in pursuing such a course; it can work no injury " to any one, and it will avoid the absurdity of allowing a party to sue on " a pretended cause of action, which is in truth no cause of action at all, " and then to recover on proof of a different demand."

Here we have a straight forward practical theory, and construction of the law, which subserves the ends of justice, and intent of the contracting parties.

Suppose that after judgment was rendered against Elisha Eldred, in Michigan, Anson Eldred had been found there, and, that, in that same suit,

by a summons or some other process known to the law and the practice of that court, Anson Eldred had been duly notified to respond, in form, to the plaintiff's declaration, and to show cause why he should not be bound co-extensively with Elisha Eldred, does any one doubt the practicability of such a course, or the jurisdiction of that court in the premises? I presume not.

Well, if Anson Eldred cannot be found in Michigan, the plaintiff is obliged to summon him, in the State where he is to be found, and by the process known to the court having jurisdiction in such State.

We have shown that the reasons urged for the admission of the exemplification in evidence, in bar of the action, were not well grounded but fallacious; that is to say that there was no "*former recovery*" in any legal sense, because a former recovery means a former recovery against the *party pleading it*, for the identical cause of action; and that there was no *merger* of the note in such recovery, as to *Anson Eldred*, because in all instances of merger, the obligation is raised from a lower to a higher condition, or in other words the simple promise of the party to pay is converted into a bond or a judgment, or something of a higher character than the simple promise. But in this case, it is claimed, by Anson Eldred, that his promise to pay is "*merged.*" or converted into *just no obligation at all!*

Bonesteel vs. Todd, 9th Mich. Rep. 371, decides that a judgment rendered under the joint debtor act, in form, against two joint debtors, only one of whom was served with process, is not an extinguishment of the demand sued upon. This case is precisely in point, and gives the proper construction to the statutes of Michigan, under which the judgment against Elisha Eldred was rendered.

In that case it is conceded by the court that the common law rule is as claimed by the defendant in the case at bar, and that the case of Candee vs. Clark, 2 Mich. 255, went the same way, as there was nothing before the court to affect the common law rule. In that case the original judgment on the joint obligation against one of the obligors, was rendered in New York. The reasoning of the court is that if the laws of New York did not discharge the defendant not served, by reason of the rendition of judgment against the co-obligor, the court in Michigan could not decide that the obligation as to the other obligor, was at an end. (Snydam vs. Barber, 18 N. Y. 468 is referred to.) Hill vs. Odber, 11 East 118, decides that in case of a foreign judgment, a party may sue on his original cause of action.

But under the constitution and laws of the United States, the judgment of one State is to have the same credit in another State, as it has by law or usage in the Courts of the State where it is rendered.

The Court says in Bonesteel vs. Todd, 9 Mich. 372, that in commencing his action, the plaintiff, instead of manifesting a desire to look to a single defendant, sues them all. The judgment runs personally against one, but it is in form against both, and but for the want of power to reach the absentee, would be valid in every respect against both. Instead of being estopped from any further joint claim by entering it, the plaintiff is entitled, at any time, to bring in the remaining party by *scire facias*, whenever he can be found in the jurisdiction, and try the case over again as to him

" In doing so he is obliged to resort to proof of the orignal demand, " and his exisiting judgment cannot avail him.

" The *common law* rule discharged the debtor who was not bound by " the judgement, from all further liability in any shape. But under all " the New York joint debtor acts, it has been held that the judgment was " no bar to a further action.

The plaintiff submits this case, with the utmost confidence, that every legal principle, as heretofore established, and expounded by this Court ; and that the Statutes of the States where his remedy is attempted to be enforced, as interpreted and construed in those States, and in States where similar Statutes exist, fully sustain the opinion of the presiding judge of the Circuit Court, whose opinion was against admitting the exemplification of record in bar of, and to defeat a recovery against the defendant.

GEORGE W. LAKIN,

Attorney and of Counsel for plaintiff,

Milwaukee, Wisconsin.

Supreme Court of the United States.

No. 191.

RICHARD MASON,

Plaintiff,

vs.

ANSON ELDRED, impleaded with ELISHA ELDRED
URI BALCOM.

ON CERTIFICATE OF DIVISION OF OPINION, &c.

DEFENDANT'S BRIEF AND POINTS.

JOHN W. CARY,
Attorney, and of Counsel for Def't, ANSON ELDRED,
Milwaukee, Wis.

Starr & Son, Printers, Milwaukee.

Supreme Court of the United States.

No. 191.

RICHARD MASON,

Plaintiff,

vs.

ANSON ELDRED, impleaded with ELISHA ELDRED
URI BALCOM.

ON CERTIFICATE OF DIVISION OF OPINION, &c.

DEFENDANT'S BRIEF AND POINTS.

JOHN W. CARY, Att'y for Def't, ANSON ELDRED, Milwaukee.

This is an action of assumpsit brought upon a promissory note made by the defendants as co-partners. The declaration stated the common Courts with a copy of the note attached, to which the defendant Anson Eldred, who alone was served with process and appeared to defend, interposed the plea of *non assumpsit*. Upon the trial the plaintiff produced and read in evidence the note, and rested. The defendant, Anson Eldred, thereupon produced and offered to read in evidence an exemplification of a judgment record in the Circuit Court for the County of Wayne, State of Michigan, by which record it appears that it was a suit brought by the plaintiff herein against the defendants herein, to recover upon the note upon which this suit is brought; that

13 Mar 1848

the defendant Elisha Eldred was alone served with process and was the only defendant who appeared in the suit, but that judgment in form passed against all of the defendants for the full amount due upon the note.

The plaintiff objected to the admission of the record in evidence for that, 1st, that it was not admissible under the pleadings, and 2d, that it constituted no bar to the plaintiff's recovery herein; on which questions the opinions of the judges were opposed.

These two questions are now presented for the consideration of this Court.

I.

The exemplified record was admissible under the plea of *non assumpsit*.

The rule has long been settled that under the plea of the general issue anything can be introduced which shows that no cause of action existed at the time of bringing suit. Payment, accord and satisfaction, foreign attachment, arbitrament, former recovery for the same cause, a higher security given and a release, all can be given in evidence under the plea of *non assumpsit*

Chitty's Pl. Vol. 1, marginal page 478.

In Young vs. Black, 7 Cranch, 565, the defendant, under the general issue, offered in evidence a record of a former suit between the same parties, in which judgment was rendered for the defendant, supported by parol proof that the former suit was for the same cause of action as the present suit. The plaintiffs denied its admissibility under the general issue. The Court say: "it has been long since established, "under *non assumpsit;* the defendant may give in evidence anything "which shows that no debt was due at the time when the action was "commenced, whether it arise from an inherent defect in the original "promise, or a subsequent discharge and satisfaction."

Hills vs. Bannister, 8 Cowen, 32.

Boyd vs. Weeks, 5 Hill, 393.

Wilt vs. Ogden, 13 John 56t

II.

The defence offered was good in substance, and a complete bar to a recovery in this suit.

The note in suit is the joint obligation of all the defendants as co-partners. The promise of a firm, as such, cannot in any sense be said to be a *joint and several* promise of the members composing the firm. Co-partnerships are formed for joint enterprises, the members thereof are bound together for a common purpose. They assume joint risks and their obligations are joint. To hold that the promise of a firm is the separate, several and individual promise of each member composing the same, would be to sever the ties by which they are bound and to work a dissolution of the co-partnership. To the effect that co-partnership obligations are joint and not *joint and several* we cite from among the numerous authorities, the case of Robertson vs. Smith, 18 Johnson's Reports, 459.

The note in suit is then the joint, and not the joint and several promise of all the defendants. The only remedy the plaintiff has thereon is to enforce the *joint liability*, and any proceeding he may institute, whereby he seeks to sever the liability and make it several can be defeated by either one of the defendants. The judgment record offered in evidence shows that plaintiff brought his suit in the State of Michigan upon this note against all of the defendants herein, that he recovered judgment in form against all of said defendants, but that the defendant Elisha Eldred was the only one over whose person the Court obtained jurisdiction. Now will it be contended for a moment that as to Elisha Eldred the joint liability of the simple contract is not *merged and extinguished* in the higher order of contract, the judgment? We think not, and in support of our position, let us suppose that after the recovery of the judgment in Michigan all of the defendants had come into the State of Wisconsin, and due service of process had been obtained upon all of them in the present suit, could not Elisha Eldred say that as to him the note had been merged in the judgment obtained in Michigan, and defeat the plaintiff's recovery in this suit, by showing

the former recovery. Then, if the joint liability is merged and extinguished as to Elisha Eldred, is it not illogical to say that it is not equally so as to the other two copartners. To hold that a joint promise or obligation can be merged and extinguished as to one of several joint obligors and not as to all, is in effect saying that the joint promise can be severed and made several.

In support of the position that the judgment in Michigan is a complete bar to a recovery in this suit, we have a long line of authorities, embracing the decisions of the highest Courts in many of the States, and we find but one or two decisions to the contrary. Such a weight of authority is at least entitled to the careful consideration of this Court.

The case of Smith and another vs. Black, 9 Sergeant & Rawle, 142, was this: John Black, the defendant in error, sold certain goods to Nathan Smith, one of the plaintiffs in error, and took his note, which he put in suit, and prosecuted to judgment, on which, however, he obtained no satisfaction. Afterwards, supposing Newberry Smith, the other plaintiff in error, to be a secret partner, he instituted this action against both. The defendants pleaded the recovery in the former suit as a bar to the latter, and the plea was held good. Justice Duncan, in delivering the opinion of the Court, says: "No principal is better "settled than that a judgment once rendered absorbs and merges the "whole cause *of action*, and that neither the matter, nor the parties, "can be severed, unless indeed where the cause of action is joint and "several, which certainly actions against partners are not. *Transit* "*in rem judicatum.* There might be a recovery at the end of sixty "years. The right of action would never be closed by any delay or "any number of judgments. The *rem judicatum* would never close, "but be a wound never healed, opening on every new discovery of a "party. It would indeed be the everlasting suit. As suppose there "were ten partners, nine of them dormant, from A to L. A the ostensible partner is first sued, judgment obtained but no satisfaction. "At the end of six years B is discovered, sued, and judgment against "him, with A and so on every sixth year, until there are ten actions "and ten judgments on one original action. For if the argument is

"worth anything, it goes to the full extent, that as soon as a new "partner is discovered, a new cause of action arises, and so on *ad in-* "*finitum*. It is by putting an extreme case, the solidity of any "position, the soundness of any argument is tested. For if it will "not answer every case, no dependance can be placed on it."

To the same effect are the following cases.

Robertson vs. Smith, 18 Johnson, 459.
Peters vs. Sanford, 1 Denio, 224.
King vs. Howe, 13 Mees. & Welsby, 494.
Thompson vs. Emmert, 15 Illinois 415.
Downey vs. F. & M. Bank, 13 Sergeant & Rawle, 288.
Sloo vs. Lea, 18 Ohio, 279.
Taylor vs. Claypool, 5 Blackford, 557.
Wann vs. McNulty, 11 Gillman, (Ill.) 355.
Moale vs. Hollins, 11 Gill & Johnson, 11.

The only case we find which does not fully accord with the principle laid down in the foregoing authorities is that of Sheehy vs. Mandeville 6 Cranch 253, decided by this Court, We do not propose to review this case and to say whether or not it is analogous in all its features to the one at bar, or those above cited, but with due deference to the high character of the Court by which it was decided and the eminent ability of the learned judge who delivered the opinion of the Court we respectfully submit, whether the better principle is not to be found in the numerous cases against which the case of Sheehy vs. Mandeville is alone arrayed.

But says the plaintiff, where is the *real justice* of allowing two of the three joint obligors to *escape* from the liability they have assumed. They do not escape the liability. It still exists, but can only be enforced in that jurisdiction where the plaintiff first *elected* to seek his remedy, to-wit: the State of Michigan. The plaintiff *must abide by his election*. He is entitled to the full relief afforded by the laws of Michigan, which is, to subject to the payment of his judgment the partnership property, and the individual property of the defendant, served with process, which may be found within that State. Let us suppose that the two defendants Anson Eldred and Uri Balcom should

now go into the State of Michigan, would the plaintiff be permitted to commence a new suit against them there on this note and recover. We think not. The joint debtor act of that State (see compiled laws of Michigan of 1857, 2 vol., chap. 133, page 1219) points out the course he must pursue. By a *scire facias* he could bring them in to show cause why he should not have execution against them on the judgment already rendered. This is his only remedy. Now upon what principle or authority can this Court say that the plaintiff can go into another State or jurisdiction, and do that which he cannot do in the State where he first *elected* to pursue these debtors. Can it be under the Constitution of the United States? By this he would be bound to bring his suit in Wisconsin upon the judgment he had obtained in Michigan. Can it be by the comity of States or Nations? A strange comity indeed which would grant a remedy which could not be had in the State toward which the comity is exercised. If he cannot bring a new suit upon the note in Michigan, he surely cannot in Wisconsin.

III.

The plaintiff claims that the statutes of Michigan and Wisconsin correctly construed, negative the conclusion, that the judgment in Michigan is a bar to an action against Anson Eldred on the note in Wisconsin. On the contrary we say, they directly affirm such a conclusion. If the joint liability of Anson Eldred and the other copartners is not merged in this judgment, why does the statute of Michigan permit the *joint property* of the defendants to be bound by this judgment.

JOHN W. CARY.

Attorney, and of Counsel for D'f't, ANSON ELDRED,
Milwaukee, Wis.